

STATE OF NORTH DAKOTA

COMMISSIONER OF FINANCIAL INSTITUTIONS

IN THE MATTER OF:)	RECOMMENDED
)	FINDINGS OF FACT,
College Loan Corporation)	CONCLUSIONS OF LAW,
PO Box 509084)	AND ORDER
San Diego CA 92150-9716)	
.....		

On June 5, 2003, the Commissioner of the North Dakota Department of Financial Institutions ("Commissioner") served an Order to Cease and Desist and Notice of Opportunity for Hearing on College Loan Corporation ("CLC") alleging that CLC is engaging, has engaged or is about to engage in acts and practices which may constitute a violation of the North Dakota Money Broker Act, N.D.C.C. ch. 13-04.1, including the solicitation of North Dakota residents for student loan consolidation loans without a Money Broker license, and requesting that CLC "cease and desist from engaging in further acts and practices in violation of N.D.C.C. ch. 13-04.1. On June 11, 2003, CLC, through local counsel, Mr. John H. Moosbrugger, Grand Forks, requested an administrative hearing on this matter before the Commissioner.

On June 17, 2003, the Commissioner requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to this matter. On June 18, 2003, the undersigned ALJ was designated to preside.

On June 23, 2003, the ALJ issued a Notice of Hearing and Specification of Issues. The notice scheduled a hearing for July 24, 2003. The issues were specified as follows: "[w]hether CLC has engaged in acts, practices or transactions in violation of N.D.C.C. ch. 13-04.1 such that the Commissioner may impose a cease and desist order against CLC under the provisions of

N.D.C.C. ch. 13-04.1, and whether such acts, practices or transactions require further relief beyond the imposition of a cease and desist order. Essentially, the Commissioner alleges that CLC is doing business as a money broker in North Dakota without a license."

On July 23, 2003, counsel for the Department of Financial Institutions ("DFI"), Assistant Attorney General Douglas B. Anderson, sent to the ALJ a Joint Statement of Stipulated Facts & Exhibits, signed by counsel for the parties (Mr. Anderson and Mr. Moosbrugger). Counsel asked that the scheduled hearing be canceled and that the ALJ set a briefing schedule as proposed in the letter. On August 4, 2003, CLC filed a Motion to Admit Affidavit and Exhibits as Evidence along with the Affidavit of Craig Garret and attached (two) Exhibits. On August 14, 2003, DFI filed an Objection to Motion to Admit Affidavit and Exhibits. The ALJ scheduled a prehearing conference to discuss the motion and DFI's objection. It was held on August 20, 2003. As a result, on August 26, 2003, the ALJ issued a letter Order on Motion and Prehearing Conference Summary. The ALJ granted CLC's motion and ordered the affidavit and exhibits included as part of the stipulated facts and exhibits but said that "the included affidavit and exhibits do not change the stated issue in this matter, and the stipulated facts remain essentially the same, though the parties may claim different arguments apply in regard to the issue in light of the included exhibits."

The stipulated facts of the Joint Statement of Stipulated Facts & Exhibits are the stated facts in this matter and will serve as the findings of fact in this matter. The Exhibits, as supplemented by the two exhibits admitted under the August 26 order serve as the documentary bases for the stated facts. The affidavit of Craig Garret is merely an explanation of how the two exhibits came to light after the Joint Statement of Stipulated Facts & Exhibits was filed, and why they should be admitted. It is not of substantive import. Again, the two exhibits admitted under the August 26 order do not substantially add to or change the stated facts and do not change the state issues in this matter.

DFI filed its Brief in Support of Cease and Desist Order on August 14, 2003. CLC filed its Memorandum of Points and Authorities and Request for Judicial Notice on September 3, 2003. DFI filed its Reply Brief in Support of Cease and Desist Order on September 18, 2003.

The ALJ should note that besides local counsel, Mr. Moosbrugger, CLC has been represented by Mr. Ross G. Simmons, San Diego, CA, pursuant to the ALJ's July 22, 2003, Order on Motion to Appear (*see* N.D. Admin. Code § 31-01.1-01-06) and pursuant to a Notice of Appearance filed by Mr. Simmons. Mr. Simmons filed the Memorandum of Points and Authorities and Request for Judicial Notice for CLC.

The ALJ takes official notice of the three documents cited in and attached to CLC's Request for Judicial Notice.

Based on the stated facts that serve as the findings of fact in this matter and the closing briefs of DFI and CLC, the administrative law judge makes the following recommended conclusions of law.

CONCLUSIONS OF LAW

1. CLC is not licensed as a money broker by DFI under N.D.C.C. ch. 13-04.1 and CLC is not specifically excluded from the licensing requirements of N.D.C.C. ch. 13-04.1 found in N.D.C.C. § 13-04.1-02

2. N.D.C.C. § 13-04.1-02 requires that "a person other than a money broker licensed and authorized under this chapter may not provide loans or leases as a form of financing, or advertise or solicit either in print, by letter, in person, or otherwise in North Dakota, the right to find lenders or provide loans or leases for persons or businesses desirous of obtaining funds for any purposes."

3. The evidence shows, by the greater weight of the evidence, that CLC offers higher education loan products and services to eligible applicants within the state of North

Dakota; retains beneficial ownership of the loans it has funded and the receipt of the economic benefits of the CLC Trust operating under agreement between CLC and Bank One, N.A.; has responsibility for the manner in which it collects, controls, and discloses individual's nonpublic personal information; has responsibility for complying with federal and state laws protecting consumer privacy rights; has the ability to decide whether or not to accept a loan application; provides Federal Family Education Loan Program ("FFELP") loans to its customers through the CLC Trust; and is not subject to direct federal regulation. CLC promotes its financial products and services through its Internet website, where it emphasizes its commitment to customer service and the customer's ability to work with the same loan counselor throughout the loan application process. CLC also identifies as prospective customers for federal consolidation loans through direct mail solicitation, "prescreened applicants" whose names and addresses have been reported by guaranty agencies, eligible lenders, or subsequent loan holders to credit bureau organizations pursuant 20 U.S.C. § 1080a(a), and in turn, from whom CLC has purchased lists of the names of borrowers with FFELP loans. CLC's direct mail solicitation advises the targeted individual, including residents of the state of North Dakota, of his or her potential eligibility to request a Federal Consolidation Loan from CLC. The lending process begins when the applicant submits a Federal Consolidation Loan Application and Promissory Note to CLC. CLC makes the final decision of whether or not to accept the loan application. If the CLC approves the loan application, it provides the FFELP loan through the CLC Trust. In essence, CLC has established a customer relationship with North Dakota applicants that does not exist between Bank One, N.A. and North Dakota applicants, thereby implicating the provisions of N.D.C.C. ch. 13-04.1 in regard to CLC's acts, practices, and transactions, particularly the licensing requirements of N.D.C.C. § 13-04.1-02.

It is CLC that is the lender, not Bank One, N.A. However, even if Bank One, N.A. were considered to be the lender, N.D.C.C. § 13-04.1-02 is expansive language for the purpose of

providing consumer protection under DFI regulation for North Dakota citizens. In that case, CLC would still be advertising or soliciting the right to find a lender, in North Dakota, that lender being Bank One, N.A.

N.D.C.C. § 13-04.1-02 requires that CLC, based on its acts, practices, and transactions in evidence in this matter, be licensed as a Money Broker in North Dakota.

4. The ALJ and DFI may not rule on any constitutional challenges or arguments made by CLC to regulation by DFI under N.D.C.C. ch. 13-04.1. *First Bank of Buffalo v. Conrad*, 350 N.W. 2d 580, 584-586 (N.D. 1984).

5. CLC's contractual relationship in the form of its agreement with Bank One, N.A. establishing the CLC Trust does not exempt CLC from the licensing requirements of N.D.C.C. ch. 13-04.1. N.D.C.C. ch. 13-04.1 creates no express or implied umbrella exemption to its licensing requirements and CLC cannot on its own authority create one by contract between two separate and distinct legal entities (itself and Bank One, N.A.). Further, actual acts, practices, and transactions show that Bank One, N.A. operates in an adjunct function of carrying out ministerial actions as directed by CLC and responsibility for monitoring the activities of CLC for compliance with the FFELP. Bank One N.A.'s limited role is not enough to exempt CLC from ch. 13-04.1 because it is the acts, practices, and transactions carried out by CLC that are intended to be regulated by ch. 13-04.1.

6. CLC's challenges to DFI enforcement of N.D.C.C. ch. 13-04.1 based upon public policy interests and the detriment to state residents are beyond the scope of the ALJ's and DFI's adjudicative authority.

7. CLC's challenges and arguments regarding selective enforcement, anticompetitive enforcement, disadvantage and harm to consumers by implementation of the terms of N.D.C.C. ch. 13-04.1 are beyond the scope of the ALJ's and DFI's adjudicative authority.

8. All other arguments and challenges made by CLC in its brief not specifically dealt with in this recommended decision are adequately argued by DFI in its briefs, and are also deemed rejected.

RECOMMENDED ORDER

The greater weight of the evidence shows that CLC is in violation of the provisions of N.D.C.C. ch. 13-04.1 by its acts, practices, and transactions in North Dakota because it has failed to become licensed under ch. 13-04.1 as required by N.D.C.C. § 13-04.1-02. The ALJ recommends that the Commissioner's June 5, 2003, Order to Cease and Desist be **affirmed** and that the Commissioner seek further relief from the unlicensed acts, practices, and transactions of CLC as may be permitted by law, unless CLC becomes licensed as a Money Broker in North Dakota in accordance with the provisions of N.D.C.C. ch. 13-04.1

Dated at Bismarck, North Dakota, this 29th day of September, 2003.

State of North Dakota
Timothy J. Karsky
Commissioner, North Dakota
Department of Financial Institutions

By: _____
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